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CORPORATIONS AND THE PRIVILEGE AGAINST SELF-INCRIMINATION. — A recent unanimous opinion from the Supreme Court of the United States contains an elaborate and forcible *dictum* to the effect that the privilege against self-incrimination is not extended to corporations by the Fifth Amendment to the Constitution. *Hale* v. *Henkle*, U. S. Sup. Ct., Mar. 12, 1906.

In England the principle "*nemo tenetur seipsum accusare*" is merely a rule of evidence, but in the United States it is a constitutional right.[1] This constitutional right is, however, only an enactment of the common-law doctrine,[2] and however differently expressed in the various constitutions, the same principle is enunciated by all.[3] The application of this principle to corporations involves two questions: first, is there anything in the nature of the privilege that makes it inapplicable to corporations? secondly, is there anything in the nature of a corporation that unfits it for the privilege?

The privilege is in its nature personal, for no one can assert it except the one from whom the evidence is sought,[4] and that one must be the person who is in danger of incrimination. An agent, provided he himself is in no danger of incrimination, cannot refuse to testify for fear of incriminating his principal, even though the principal be a corporation,[5] though there is at least one case to the contrary, holding that the agent on the stand is the corporation on the stand.[6] The Supreme Court, however, accepts the prevailing view, and if that is sound, it must follow logically that a corporation can

[1] Counselman *v.* Hitchcock, 142 U. S. 547.
[2] See Wigmore, Ev., § 2252.
[3] Counselman *v.* Hitchcock, *supra*, at 584–586.
[4] N. Y. Life Ins. Co. *v.* People, 195 Ill. 430.
[5] Gibbons *v.* Proprietors of Waterloo Bridge, 5 Price 491.
[6] Davies *v.* Lincoln Nat. Bank, 4 N. Y. Supp. 373.

never be a witness, with a possible exception in the case of a bill of discovery filed directly against it. In such a case it has been held that a corporation is entitled to the privilege against self-incrimination.[7] But bills of discovery apply only to civil cases,[8] and it is therefore difficult to see how the corporation could assert the privilege in an investigation by the state, unless one adopts the apparently erroneous New York view that an officer on the stand represents the corporation. From the nature of the privilege, then, it is seen that the corporation may in one narrow class of cases be in a position to exercise it.

While, then, in a civil suit, it would seem that there is no reason for treating the corporation differently from a natural person, yet, in an investigation by the state, there is a difference arising from the very nature of a corporation and of corporate rights. The corporation receives its rights from the state and can act only in a manner prescribed by its creator. It has special privileges and franchises and must account for their use, and it would be subversive of justice to say that it could refuse to do so on the ground that it had abused them. Therefore, although a corporation is held by the principal case within the protection of the Fourth,[9] and has been held within the protection of the Fourteenth Amendment,[10] and probably would be protected by the clause in the Fifth forbidding double jeopardy, it would seem that its nature prevents it, as between it and the state, from receiving immunity from investigation and disclosure of its internal affairs.

THE GOVERNOR'S RIGHT TO SUE. — The executive power of the nation is lodged in the President, whereas that of the state is vested in a number of independent heads, each deriving his authority from the same source, the people. And while Supreme Court adjudications have tended to enlarge the scope of the presidential power, state decisions have strictly confined the governor, as one member of a multifarious executive, within his granted powers, denying him any inherent rights.[1] All state constitutions, but those of Massachusetts and New Hampshire, name as one of the duties of the governor that of seeing that the laws are faithfully executed.[2] The extent of the power thereby conferred was lately passed on by the Mississippi Supreme Court. The governor, believing a contract made by a state board to be in violation of the Constitution, called upon the attorney-general, who as a member of the board voted for the contract, to file a bill to enjoin its execution. Upon his refusal the governor himself brought suit

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[7] Logan *v.* Penna. Rd. Co., 132 Pa. St. 403.
[8] See Logan *v.* Penna. Rd. Co., *supra.*
[9] Hale *v.* Henkle, *supra.*
[10] Smyth *v.* Ames, 169 U. S. 466.

[1] For a general discussion see Goodnow, Administrative Law of the United States, bk. II c. III; Wyman, Administrative Law, c. VIII, and cases cited, especially Field *v.* People, 3 Ill. 79.

[2] The Massachusetts constitution (c. II, art. 4) and the New Hampshire constitution (art. 61) contain somewhat similar provisions. The constitutions in force down to 1894 have been generally relied on. In Professor Goodnow's excellent recent treatise, p. 104, occurs this astonishing statement: "As a general thing there is no provision in the state constitutions similar to that to be found in the United States Constitution, which makes it the duty of the chief executive to see that the laws be faithfully executed."